

M e m o r a n d u m**435.0122**

To: Ms. Nicole Gugger
Return Review

October 30, 1991

From: Victoria Lani Arena
Tax Counsel

Subject: B--- Corporation
SR -- XX-XXXXXX
Fabrication vs. Installation

This is in response to your memorandum of August 8, 1991, requesting our opinion as to whether certain services performed by the taxpayer during the 4th quarter of 1990, constitute taxable assembly charges.

Facts

The taxpayer's June 5, 1991 correspondence describes the facts in this matter as follows:

"We manufacture steel stampings used in the construction of hollow concrete floors. This product is complete and ready to ship directly off of the press."

"Now and then an installing contractor will ask us to "pre-assemble" these stampings, into eight square foot sections, as an assist to the jobsite installation. We do this at our facility for a fee. This labor fee, or charge, has nothing to do with the fabrication of the product, but only helps the contractor with the installation."

Sales Tax – General Discussion

Except to the extent specifically excluded or exempted by statute, the Sales and Use Tax Law, California Revenue and Taxation Code (Section 6001 et seq.) imposes an excise tax in connection with the retail sale of all tangible personal property sold or purchased for use in this state. (All statutory citations are to the California Revenue and Taxation Code, unless otherwise noted herein.) Section 6051 imposes sales tax on the gross receipts from the retail sale of all tangible personal property sold in this state. The sales tax is imposed upon the retailer. California Civil Code Section 1656.1 allows the retailer to collect sales tax reimbursement from the consumer.

Gross Receipts Include Services That are a Part of the Sale

“Gross Receipts” is an all encompassing concept. As noted above, except to the extent specifically excluded or exempted by statute, all gross receipts from the retail sale of tangible personal property sold or purchased for use in this state are subject to sales or use tax.

Section 6012(b)(1) provides that “gross receipts” include “[a]ny services that are a part of the sale.” The Board of Equalization has long-taken the position that any services rendered in connection with a sale of tangible personal property are taxable as “services that are a part of the sale” within the meaning of Section 6012(b)(1). In our opinion, the fact that such services are related to, and are rendered contemporaneously with, the sale of tangible personal property is generally sufficient to render the charges for such services taxable. It is irrelevant whether or not such charges are separately stated or are provided at the option of the purchaser. It is also irrelevant whether title passes to the purchaser before or after the services are rendered.

The concept of “services that are a part of the sale” is illustrated in the following Business Taxes Law Guide annotation:

“295.1680 “Services That Are a Part of the Sale’ include uncrating, trucking to building site and placing in rooms, where agreement obligates seller to perform these services. 10/19/50.”

The Board of Equalization has taken the position that where the sale agreement obligates the seller to provide certain services, such services are considered to be part of the sale.

Producing, Fabricating and Processing Property Furnished by Consumers

Section 6006(b) provides that the term “sale” means and includes:

“The producing, fabricating, processing, printing or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing or imprinting.”

Sales and Use Tax Regulation 1526 implements and interprets Section 6006(b). Subsection (b) of the regulation provides:

“(b) OPERATIONS INCLUDED—REPAIRING AND RECONDITIONING DISTINGUISHED. Producing, fabricating, and processing include any operation which results in the creation or production of tangible personal property or which is a step in a process or series of operations resulting in the creation or production of tangible personal property. The terms do not include operations which do not result in the creation or production of tangible personal property or which do not

constitute a step in a process or series of operations resulting in the creation or production of tangible personal property, but which constitute merely the repair or reconditioning of tangible personal property to refit it for the use for which it was originally produced.”

Assembly and Removal of Tangible Personal Property

The Board of Equalization takes the position that assembly and disassembly of tangible personal property purchased by the buyer constitutes taxable fabrication and, therefore, must be included in the measure of gross receipts. This position is demonstrated in the following three Business Taxes Law Guide annotations:

“435.0040 Assembly of Furniture-Fabrication, etc. A bank (consumer) ordered furniture from a California retailer who ordered the furniture from an out-of-state supplier for direct shipment to the bank, with title to pass out-of-state. The retailer assembled the furniture on the bank’s premise. The purchase price of the knocked-down furniture was subject to use tax, and the assembly of the parts was a step in a series of operations resulting in the production of tangible personal property. Accordingly, such an assembly constituted fabrication labor subject to sales tax. 7/25/67.

“435.0060 Bolting and Assembly Shelving. A consumer ordered shelving from a retailer; the retailer ordered the shelving from the factory for direct shipment to the consumer; when the shelving arrived, the retailer assembled it on the consumer’s premises for a separately stated charge. The charges for bolting and assembling the shelving are subject to the sales tax, since such assemblage constitutes a step in a series of operations resulting in the production of tangible personal property. 3/15/66.

“435.0100 Dismantling. The seller of surplus houses who also dismantles them at request of buyer and makes an additional charge for such dismantling, must include such charge in his taxable gross receipts. 9/2/54.”

However, the Board of Equalization has long-taken the position that tax is not applicable to charges for erecting and/or removing customer-provided pre-fabricated tangible personal property.

Installation

Section 6012(c)(3) provides that “‘gross receipts’ do not include...(3) the price received for labor or services used in installing or applying the property sold.”

Sales and Use Tax Regulation 1546(a) implements and interprets Section 6012(c)(3) and provides:

“(a) INSTALLATION GENERALLY. Charges for labor or services used in installing or applying the property sold are excluded from the measure of the tax. Such labor and services do not include the fabrication of property in place.”

Consequently, installation and fabrication are mutually exclusive.

The Board of Equalization has long-taken the position that completing the production of a finished article by affixing one piece of new tangible personal property to another constitutes taxable fabrication. This is contrasted to the situation in which a piece of new tangible personal property is affixed to the customer’s previously-owned tangible personal property which constitutes non-taxable installation. [See e.g., Bus. Tax. Law Guide Annotation 435.0470 (9/8/77.)]

Opinion: Services Part of the Sale and Fabrication vs. Installation

In this case, it is our opinion that where the taxpayer sells and assembles the stampings into eight square feet sections (the “stamping sections”), tax applies to all charges for labor and materials. The assembly charges are taxable as a part of gross receipts because there is no applicable exclusion or exemption from tax liability. Such assembly services are not considered to be installation. Instead, they are subject to tax either as “services that are a part of the sale” or as “fabrication”. They may be considered to be “services that are a part of the sale” of tangible personal property pursuant to Section 6012(b)(1) because they are related to, and are rendered contemporaneously with, the sale of the stamping sections.

Alternatively, the taxpayer’s services may be considered to be “fabrication” within the meaning of Section 6006(b) and Regulation 1526. The assembly services are “... step[s] in a process ... resulting in the creation or production of tangible personal property.” The property being sold to the customer consists of the assembled stamping sections. Assembly of the stampings into sections is merely a step in that process. Finally, the fact that the customer paid for the materials as part of the total cost of the assembled stamping sections indicates that the materials were furnished indirectly by the customer and fabricated by the taxpayer.

For all of the foregoing reasons, it is our opinion that the entire cost of the stamping sections including the services rendered to assemble them, is subject to sales tax.

Finally, in your August 8, 1991 memorandum, you note that there is a BT-414C (Report of Examination of Records) in the taxpayer's file which indicates that the labor deduction was verified as of the date of the report. I have examined the BT-414C which covers the period from July 1, 1986 to March 31, 1989. The auditor concluded: "Labor deduction was deemed to be repair labor. No fabrication labor disclosed." This conclusion is not binding upon the present inquiry as it pertains to a different audit period.

If you have any further questions, please do not hesitate to contact me.

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